Decision **DRAFT DECISION OF ALJ PULSIFER (Mailed 12/9/2003)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.	Rulemaking 02-01-011 (Filed January 9, 2002)

OPINION REGARDING PETITION TO MODIFY DECISION 03-04-057

By this order, we grant, in part, and deny, in part, the Petition for Modification filed on September 25, 2003 by the Alliance for Retail Energy Markets and the Western Power Trading Forum (collectively, the "Joint Parties"). The Joint Parties seek an order modifying two provisions of Decision (D.) 03-04-057, issued on April 17, 2003. As explained below, we grant the requested modification relieving Energy Service Providers (ESPs) of the requirement to sign an affidavit attesting to the compliance of Direct Access (DA) customers with DA load suspension rules. We deny the requested modification, however, seeking to permit a DA customer merely to calculate the net change in DA load from all replacements and relocations in facilities within its utility-specific service territory. While denying this requested modification, however, we do find it appropriate to clarify the intent of the required relocation and replacement documentation process, and to accommodate situations where more than one facility replaces one or more facilities or accounts that are being closed.

Comments in response to the Petition to Modify were filed on October 27, 2003. Comments were filed by Pacific Gas & Electric Company

(PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric (SDG&E). On November 5, 2003, the Joint Parties filed a third-round reply to parties' comments, pursuant to authorization granted by the Administrative Law Judge.

I. Background

D.03-04-057 addressed an earlier petition of Albertson's, Inc. (Albertson's) to modify D.02-03-055, the Commission's decision adopting rules for implementing the temporary suspension of Direct Access (DA) required under Assembly Bill (AB) 1X. In that petition, Albertson's had requested that rules adopted in D.02-03-055 be modified to allow existing DA customers to add new locations or accounts to DA service provided there is no net increase in the amount of load that is served under DA as of September 20, 2001. The April 17 Decision also discussed the requirement calling for the DA customer and its ESP to sign an affidavit that would state, under penalty of perjury, that the customer's aggregate DA load will not increase by virtue of the relocation or replacement of facilities.

In accordance with D.03-04-057, a proposed affidavit[1] was circulated by SDG&E, PG&E and SCE (collectively, the IOUs). It consists of two parts, an ESP Declaration and a Customer Declaration, as well as an attached form entitled Customer Location Relocation/Replacement Declaration. The language which relates to the subject of this petition is contained in paragraph 4 of the ESP Declaration, and reads as follows:

[1] Petitioners attached a copy with their Petition, as Exhibit B, with suggested modification indicated through the use of underlining or strikethroughs.

4. The change in service from the Current Location to the new location will cause no net increase in Customer's aggregate direct access load in effect as of September 20, 2001 for all Customers' facilities that have been relocated or replaced within utility's existing service territory.

The Joint Parties argue that the design of the affidavit has proven to be problematical, thus prompting their petition for modification regarding two issues, as discussed below. The Joint Parties request that the Rule 1 language requiring ESPs to attest to no net change in load on behalf of their customers be eliminated, and that such attestation be required solely of the customer. Second, Joint Parties propose that Rules 5 and 7 be modified to remove the requirement that the customer attest that the replacement or relocation facilities will not cause a net increase in the customer's aggregate amount of load that was eligible to be served by DA as of September 20, 2001. Joint Parties argue that the calculation of any net increase should not apply solely to those accounts that have been relocated. Joint Parties argue that the requested clarifications are necessary for affected DA customers and the ESPs who serve them to move forward with the relocations that were the subject of the original Albertson's petition for modification.

II. ESP Affidavit Requirements

A. Positions of Petitioners

D.03-04-057 requires that ESPs sign, under penalty of perjury, an affidavit that the change in location will have no net increase in Customer's aggregate DA load as of September 20, 2001. Joint Parties contend that it is fundamentally impossible, however, for ESPs to adhere to such a requirement because ESPs are not in control of the meter, do not control their customer's operations, and are unable to ensure that the customer will not increase its load. Joint Parties further contend that the body of D.03-04-057 and the Conclusions of

Law contained therein indicate that the calculation, verification and attestation that no increase in DA load would occur were to be solely the responsibility of the DA customer.

Because ESPs have no control over the individual operations of direct access customers, Joint Parties argue, ESPs cannot reasonably be required to attest under penalty of perjury that the change in a customer's location will not result in a net increase in the Customer's aggregate DA load. Joint Parties thus propose that ESPs not be required to attest by affidavit, under penalty of perjury, that the load of customers who transfer their direct access rights from one location to another will not exceed the load at the prior location. Joint Parties argue that such affidavit should be solely the responsibility of the DA customer who controls the load.

Joint Parties thus seek modification of the final sentence of the discussion section of Rule 1. (Also, a stray period at the end of the date specified in that discussion section should be removed.) Joint Parties propose to implement the modification relieving ESPs from the affidavit requirement by dividing the final sentence of the discussion section of Rule 1 into two sentences. The first sentence would make it clear that ESPs were required to sign an affidavit for adding customers to their October 5 and November 1 lists. The second would require the affidavit to be signed solely by the customer, and remove the reference to the ESP signing the required affidavit. Specific modifications proposed to the text of the decision are attached as Exhibit A to the Petition.

Joint Parties also propose that Paragraph 4 be deleted from the ESP Declaration, as they believe this representation is already sufficiently covered by Paragraph 5 of the Customer Declaration.

B. Position of other Parties

SDG&E supports the Petition's proposed modifications to the affidavit and to D.03-04-057. As long as customers make the required attestation and maintain the records required by D.03-04-057, SDG&E submits that this requirement is as unnecessary as it is impracticable.

PG&E agrees that ESPs should not be required to sign an affidavit to the effect that the relocated customer's load will not exceed the customer's load at the prior location because ESPs have little if any control over the operations of their customers. However, PG&E does not believe that ESPs should have no obligation whatsoever in this regard. PG&E proposes instead that ESPs sign a statement saying that after making appropriate inquiries, and based on the ESP's information and belief, the relocated customer's load will not exceed the customer's load at the prior location.

SCE opposes the proposed elimination of the requirement for the ESP to sign the affidavit, arguing that the affidavit requirement in D.03-04-057 is working as intended, and should not be removed. If the Commission decides to change the affidavit requirements, however, SCE suggests alternative language. Rather than deleting the requirement that the ESP attest to the level of its DA customer's load, SCE proposes that it be modified (as indicated by underlined text) to state the following:

> <u>After making a reasonable inquiry and investigation of the Customer's Current Location and new location</u>, the ESP represents, <u>on information and belief</u>, that the change in service from the Current Location to the new location will cause no net increase in Customer's aggregate direct access load in effect as of September 20, 2001 for all Customers' facilities that have been relocated or replaced within utility's existing service territory."

In addition, SCE argues that AReM/WPTF's proposed changes to Rule 1 as shown in its Exhibit A.1 would result in unintended consequences to the original intent of the DA Suspension Decision D.02-03-055. By deleting the phrase, "both the ESP and," AReM/WPTF would also relieve ESPs from the legal responsibility of attesting that additions of new customers to the October 5th and November 1st DA lists are in accordance with D.02-03-55. Even AReM/WPTF admits that the ESPs signature on such an affidavit is clearly required (Petition, p. 6).

C. Discussion

We conclude that Joint Parties' proposed modification is reasonable to the limited extent it seeks to relieve the ESP from the requirement to sign an affidavit attesting that there is no net increase in DA load as a result of relocations. ESPs must still attest that additions of new customers to the October 5th and November 1st DA lists are in accordance with D.02-03-55. We agree, however, that ESPs have no control over the individual operations of DA customers, and thus should not be required to attest under penalty of perjury that the change in a customer's location will not result in a net increase in the customer's aggregate DA load. By retaining the requirement that the DA customer attest "under penalty of perjury" that the load has not increased beyond permissible levels, the intent of D.03-04-057 to ensure compliance is preserved.

PG&E, while conceding that some change to the ESP affidavit requirements is warranted, opposes Joint Parties' proposal to relieve ESPs from any attestation responsibility with respect to DA load relocations. SCE also argues that is any modification is granted that ESPs attestation to no load increase be qualified with the clause "on information and belief," rather than

"under penalty of perjury." PG&E and SCE claim that maintaining some lesser requirements on ESPs in this regard will an additional check on "potential gaming" by DA customers relocating load. SCE's experience has been that because ESPs have the responsibility of signing the affidavit, they have been very careful to work with their customers to ensure that there will be no increase in load as a result of a facility relocation before signing the affidavit.

We are unpersuaded, however, as to the necessity for this additional level of administrative burden on ESPs. The legal requirement that remains on the DA customer is an effective check against the potential for a customer not to comply with the rule. This responsibility entails not only the DA customer's relationship with the IOU and Commission rules, but also in coordinating any load relocations with its ESP. Thus, we find it inappropriate to add administrative hurdles on business transactions that are unnecessary, and burdensome. Since it is the customer, and not the ESP, that has control over the load, the ESP is not in a position to violate the load restriction requirements since it is the DA customer that controls the level of the load. Thus, it is sufficient that the affidavit requirement with respect to the no load growth attestation be limited to the DA customer, thereby assigning the appropriate legal responsibility for compliance with the DA customer that has power to control the outcome. We shall accordingly adopt the proposed modification in language to eliminate this attestation by ESPs. We shall also eliminate Paragraph 4 from ESP declaration, as requested.

III. Treatment of Load Replacements and Relocations

A. Position of Joint Parties

Joint Parties also propose a modification or clarification of the requirements for determining allowable DA load under the rules adopted in

Appendix A of D.03-04-057. Joint Parties argue that Appendix A of that Decision should be interpreted to permit a DA customer to calculate the net change in DA load from all replacements and relocations in facilities within its utility-specific service territory, rather than based merely on an account-by-account interpretation that limits the calculation to a direct one-for-one replacement, as reflected in the utilities' proposed affidavit.

Joint Parties argue that a customer should be permitted to relocate any DA load from an active DA account to a proposed new account so long as there is no net increase across all eligible DA accounts, and that the affidavit adopted by the utilities should be consistent with the proposed modified language to D.03-04-057.

Joint Parties seek modification to permit relocations so long as there is no net increase in the customer's amount of total eligible DA load. Under the proposed approach, eligible DA load would be determined merely by comparing the customer's entire total DA load prior to and after the relocation, rather than on an account-by-account basis or solely as a comparison of the respective loads of relocated accounts. Thus, Joint Parties propose that Rule 5 in Appendix A and related discussion in the text of the decision be modified to delete the requirement that a customer may relocate DA load to a new location only on a "one-for-one" or "account-by-account" basis.

B. Position of Other Parties

PG&E and SCE oppose the proposed modification seeking to eliminate the "one-for-one" or "account-by-account" restrictions. SCE argues that parties have already had the opportunity to address this precise issue in briefs leading to the adoption of D.03-04-057, and that the Commission specifically adopted the "one-for-one" requirement to ensure that the standstill principle was not

violated. PG&E believes that the existing rule already allows significant flexibility to address the likelihood that the relocation load does not exactly match the relocated load. PG&E argues that if the location-by-location requirement were dropped, it would become impossible to determine if relocations were occurring as proposed to prohibited load shifts that did not involve relocations or replacements.

SDG&E, by contrast, agrees with Joint Parties' proposed elimination of the account-by-account requirement. SDG&E believes that as long as there is no increase in DA load across all of the customer's eligible accounts, there would be no compromise of the standstill principle.

C. Discussion

We decline to grant the proposed modification in D.03-04-057, in the manner proposed by Joint Parties. The intent behind the requirement for tracking of replacements and relocations as adopted in D.03-04-057 was to guard against violations of the DA suspension rules prohibiting new DA accounts being added after the suspension date. We expressly stated in D.03-04-057 that "appropriate documentation is warranted to verify that DA load associated with a new location or facility is in fact replacing DA load from one or more previous facilities that are no longer in service." (D.03-04-057, p. 15 (slip op.).)

Thus, the stated intent of D.03-04-057 was to provide for enforcement of the DA suspension rules by preventing the addition of new accounts that were not attributable to a relocation or replacement of an existing facility. The addition of such new accounts beyond the limited exception for replacements or relocations would constitute a violation of the DA suspension rules. If multiple new accounts could be created for facilities without requiring an accounting of the specific facilities that were being replaced, it would become difficult to

prevent "new DA load at a new location merely to make up for slower business and reduced electricity consumption at other facilities that continue to operate" (*Id.*, at p. 15 (slip op.).) Joint Parties' proposed modification eliminating this safeguard would open the door for the very sort of violation we prohibited in D.03-04-057.

Joint Parties argue that a customer "should be permitted to relocate any DA load from an active DA account to a proposed new account without closing the active account, so long as there is no net increase in the amount of load served under the DA as of September 20, 2001."[2] Yet, if an existing account is not closed, then by definition, it cannot be replaced by a newly created account elsewhere. If an account is replaced, it is no longer active. To this extent, the proposed modification would violate the express intent of D.03-04-057 to limit new accounts merely to replacements or relocations of existing accounts. If, on the other hand DA load is truly being merely relocated from an existing facility, the existing rules already provide the flexibility that the relocated or replaced load need not exactly match the old load. If load at the replacement facility is greater than that of its predecessor facility, DA service is allowed for the higher load provided that the increment cannot exceed the cumulative net reduction in DA load from the customer's prior replacements or relocations.

While declining to adopt the modification in the manner sought by parties, however, we acknowledge the fact that there may be situations involving certain relocations and/or replacements where two or more smaller facilities replace a single larger facility. There may also be other combinations of

[2] *See* Reply Comments of Joint Parties filed November 5, 2003, p. 7.

replacements or relocations resulting in something other than an exact one-for--one correspondence between an original facility and a single replacement. In such situations, we recognize that a strict limitation permitting only a single facility to qualify for determining replacement load would not reflect the actual transfer process. On the other hand, where a DA customer is merely planning to expand operations by building new facilities that are not relocations or replacements of existing facilities, the load at such new facilities is not a "replacement" or "relocation." In such situations, it would be abuse of the permitted flexibility we have granted to attempt to claim such facilities were replacements or relocations when they were not.

We thus find it appropriate to clarify the intent of the documentation requirements adopted in D.03-04-057, as follows. We shall permit the replacement or relocation of DA accounts involving multiple relocations or replacements to be consolidated into a smaller number of new accounts *provided* that records are kept to demonstrate that the relocated accounts were all closed, and that the load on the new accounts at the replacement locations matches the total load of the closed accounts (subject to the flexibility granted in D.03-05-057 for cases where the relocated load(s) are slightly larger). In any event, the customer must identify and demonstrate a specific correspondence between (a) the new accounts that are claimed as replacement or relocated load and (b) the closed accounts whose load is being replaced or relocated. The customer, however, may not apply reductions in DA load from any of its continuing DA accounts and/or facilities to count toward offsetting increases in DA load at newly constructed facilities and/or through replacement accounts.

We emphasize, however, the process of relocation and/or replacement of existing load to different accounts must in no way be construed as a relaxation

or compromise of our previously adopted DA suspension requirements. This limited provision permitting flexibility in the manner in which replacement or relocated facilities are configured maintains the requirement that there be a direct correspondence between accounts that are closed and the accounts used to replace them. Even though a single account may be closed and replaced with two or more smaller accounts, there still must be a correspondence matching the load applicable to the account or accounts closed and the substitution accounts used as a replacement. Thus, the process for relocation and replacement of DA accounts is consistent with our continuing vigilance to preserve the integrity of the DA suspension rules.

We conclude that this flexibility is sufficient, and that D.03-04-057 should otherwise be preserved as a necessary means of upholding the integrity of the DA suspension rules and standstill principle. Petitioners' proposed modification to eliminate any requirement for identifying the specific account(s) that is, in fact, being relocated or replaced, would weaken the ability to enforce the suspension rules prohibiting customers from acquiring new DA load. The relocation documentation policy is necessary for proper administration and tracking of DA relocations. Without documentation requirements to link an account being closed with a specific replacement, there would be no means of reasonably ascertaining whether a new DA account was merely replacing an old account or being set up merely as a new account in violation of the suspension rules.

A previous petition to modify D.03-04-057, filed August 1, 2003, sought to remove the restrictions on growth in DA load at existing accounts, arguing

that the standstill principle was not violated because they were leaving in place the restriction on adding new accounts.[3] Now in the instant pleading, petitioners seek to remove the restriction on adding new accounts as long as there is no net increase in existing load. Taken together, these modifications, if adopted, would essentially gut the standstill principle, permitting both new DA accounts and unlimited load growth.

Accordingly, the petition to modify this provision in the manner proposed by parties is denied.

IV. Comments on Draft Decision

The Draft Decision of Administrative Law Judge Thomas R. Pulsifer in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Pub. Util. Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on December 29, 2003, and reply comments were filed on December 19, 2003. We have taken the comments into account, as appropriate, in finalizing this order.

V. Assignment of Proceeding

Carl W. Wood and Geoffrey F. Brown are the Assigned Commissioners and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. ESPs are required to sign an affidavit, pursuant to D.03-04-057 that the change in a customer's location will not result in a net increase in the Customer's aggregate DA load.

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[3] A Draft Decision is currently being considered by the Commission in response to the August 1, 2003 Petition to Modify. There is no intent to prejudge the August 1, 2003 Petition.

2. Because ESPs have no control over the individual operations of direct access customers, they cannot reasonably ascertain whether the change in a customer's location will result in a net increase in the Customer's aggregate DA load.

3. By retaining the requirement that the DA customer attest "under penalty of perjury" that the load has not increased beyond permissible levels, the intent of D.03-04-057 to ensure compliance is preserved.

4. The intent behind the requirement for an account-by-account tracking of replacements and relocations as adopted in D.03-04-057 was to guard against violations of the DA suspension rules prohibiting new DA accounts being added after the suspension date.

5. Without the account-by-account documentation requirements, there would be no means of reasonably ascertaining whether a new DA account was merely replacing an old account or being set up as a new account in violation of the suspension rules.

6. No party requested evidentiary hearings.

Conclusions of Law

1. The Petition to Modify should be granted, to the extent it seeks to eliminate the affidavit requirement applicable to ESPs.

2. The Petition to Modify should be denied to the extent it seeks to permit a DA customer merely to calculate the net change in DA load from all replacements and relocations in facilities within its utility-specific service territory.

O R D E R

IT IS ORDERED that:

1. The Petition to Modify Decision (D.) 03-04-057 is granted, in part, to the limited extent that it seeks to eliminate the requirement for the ESP to sign an affidavit attesting that the level of a customer's DA load does not exceed permissible levels. The following text modification of the Rule 1 as set forth in D.03-04-057, Appendix A, page 3 is accordingly adopted, limiting such attestation requirements to the DA customer (with additions underlined, and deletions struck through):

> We will allow additions to the October 5th and November 1st lists [footnote omitted] for customers with a valid direct access contract as of September 20, 2001 (including additional meters, accounts or sites as provided in Rules 5 and 6 below), using the AReM process, along with an affidavit signed by the customer stating under penalty of perjury that the contract date is correct A separate affidavit, signed by the customer, must state under penalty of perjury that the amount of customer-specific aggregate direct access load for facilities that have been relocated or replaced within the customer's existing service territory that is related to the new meters, accounts or sites does not exceed that in effect as of September 20, 2001, and that the DA customer's load will not increase by virtue of such relocation or replacement of facilities.

2. Paragraph 4 of the ESP Declaration is likewise hereby deleted. The amended ESP Declaration, with the deleted text struck through is set forth in the Appendix of this order.

3. It is appropriate to clarify the intent of the relocation and replacement documentation process adopted in D.03-04-057 to accommodate situations where more than one facility replaces a facility or account that is closed *provided* that records are kept to demonstrate that the relocated accounts were all closed, and

that the load on the new accounts at the replacement locations matches the total load of the closed accounts (subject to the flexibility granted in D.03-05-057 for cases where the relocated load(s) are slightly larger).

4. The Petition to Modify is denied, in part, to the extent that it seeks to permit a DA customer merely to calculate the net change in DA load from all replacements and relocations in facilities within its utility-specific service territory.

5. D.03-04-057 is hereby clarified to expressly permit more than one facility or account to replace a facility or account that is closed *provided* that records are kept to demonstrate that each of the relocated accounts were all closed, and that the load on the new accounts at the replacement locations matches the total load of the closed accounts (subject to the flexibility granted in D.03-05-057 for cases where the relocated load(s) are slightly larger).

6. In any relocations or replacements claimed as eligible for DA service under the provisions of D.03-04-057, the customer must identify and demonstrate a specific correspondence between (a) the new accounts that are claimed as replacement or relocated load and (b) the closed accounts whose load is being replaced or relocated. The customer may not apply reductions in DA load from any of its continuing DA accounts and/or facilities to count toward offsetting increases in DA load at newly constructed facilities and/or through replacement accounts.

This order is effective today.

Dated _____, at San Francisco, California.

Appendix
Adopted Modifications to
Customer Relocation/Replacement Declaration

1. ESP Declaration

I, _____, state as follows:

1. I am an officer of _____ *(Name of ESP)*("ESP") authorized to make this declaration. I have personal knowledge of the matters set forth herein and if called upon as a witness could and would testify competently thereto.
2. Under the provisions of the Agreement, the Customer has the right to receive direct access service from ESP for electric service loads located at the Current Location service address under the service accounts identified below and at the New Location. "Current Location" means a single existing customer site where the electric load of one or more customer accounts is currently being served under direct access, or is eligible for direct access service. "New Location" means either (1) the Current Location site after the facilities have been refurbished, reconstructed or remodeled or (2) a different site from the Current Location which has been acquired by customer for the purpose of, or at which the customer has engaged in new construction for the purpose of, accommodating the relocated business and operations from the Current Location.
3. All conditions of the Agreement necessary for a transfer of electric service from Customer's Current Location to New Location have been satisfied, including any necessary approvals by ESP.
4. ~~The change in service from the Current Location to the new location will cause no net increase in Customer's aggregate direct access load in effect as of September 20, 2001 for all Customers' facilities that have been relocated or replaced within utility's existing service territory.~~

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ___ day of _____, _____ at _____, _____ *[city, state]*.

_____ *[signature]*

_____ *[title]*